BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLESETTA LYDAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,081
VIA CHRISTI REGIONAL MEDICAL CENTER	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed the Award of Review & Modification dated November 3, 1997, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas, on May 8, 1998.

APPEARANCES

Dennis L. Phelps appeared for the claimant. Edward D. Heath, Jr., appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award of Review & Modification dated November 3, 1997, and the Agreed Award dated August 2, 1995.

ISSUES

After an award has been entered, a worker may apply for review and modification of that award when there is a change in circumstances. Here, claimant continued to work for the respondent in an accommodated position that she later lost due to a merger between St. Francis and St. Joseph hospitals. For personal reasons, claimant declined a similar job that paid a comparable wage and ultimately accepted a job at lower pay. Under these facts, is claimant now entitled to modification of her award? That is the only issue now before the Appeals Board.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) By Agreed Award dated August 2, 1995, the claimant, Charlesetta Lyday, was granted benefits against St. Francis Regional Medical Center for an 8 percent permanent partial general disability for a repetitive use injury occurring between May 1993 and September 24, 1994. For purposes of that award, the parties stipulated that the accident date for purposes of computation should be September 24, 1994, and that Ms. Lyday's average weekly wage was $568.86.

(2) Ms. Lyday worked for St. Francis Regional Medical Center in its kitchen as a tray line wash supervisor for 15 years. Her job title was customer service specialist. When it was determined in September or October 1993 that she could no longer perform that job because of her work-related injuries, she was moved to the cafeteria where she worked until February 16, 1997.

(3) Because St. Francis and St. Joseph hospitals merged, they reduced the number of customer service specialist positions on the St. Francis campus from four to one. In September 1996, Ms. Lyday's customer service specialist position was abolished and replaced by the lesser paying cafeteria tech position. The customer service specialist position was relabeled to shift leader. Ms. Lyday applied for the shift leader position on the St. Francis campus but it was given to a coworker with greater seniority. She was ultimately placed into the cafeteria tech position where she worked until February 16, 1997, when she was returned to the kitchen as a cold food technician.

(4) In January 1997, Ms. Lyday's pay rate dropped to $9.72 per hour or $388.80 per week. Because of this reduced wage, Ms. Lyday initiated this proceeding for review and modification and requests the Appeals Board to modify her permanent partial general disability award as of January 18, 1997, the date the pay reduction took effect.

(5) The parties stipulated Ms. Lyday has lost the ability to perform 59.5 percent of her former work tasks due to her repetitive use injury.

(6) In September 1996 when Ms. Lyday unsuccessfully applied for the shift leader position on the St. Francis campus, Wanda Reinking, St. Francis's operations manager for nutrition services and Ms. Lyday's supervisor, offered Ms. Lyday a job at the St. Joseph campus. Ms. Lyday contends that she was not offered the job or even told what it paid or entailed. On the other hand, Ms. Reinking testified that she told Ms. Lyday that the job was shift leader, what it paid, and its hours.

(7) The Appeals Board finds the hospital did offer Ms. Lyday a shift leader position at the St. Joseph campus that would have paid a comparable wage. That conclusion is based upon Ms. Reinking's testimony, which the Appeals Board finds the more credible and persuasive. The Appeals Board also finds that Ms. Lyday declined the job because it would have changed her hours from 11:30 a.m. until 8 p.m. to 2 p.m. until 10:30 p.m.

and, therefore, the hours conflicted with her caring for her husband and the work she performed for her church.

CONCLUSIONS OF LAW

The Award of Review & Modification should be affirmed.

(1) Because hers is an "unscheduled" injury, Ms. Lyday's entitlement to permanent partial disability benefits is governed by K.S.A. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

(2) The above statute, however, must be interpreted in light of the decisions in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that workers could not refuse to attempt to perform an accommodated job that paid a comparable wage and avoid the presumption of no work disability set forth in K.S.A. 1988 Supp. 44-510e. In Copeland, the Court held that a worker's post-injury wage would be based on the ability to earn unless the worker had made a good faith attempt to find appropriate employment.

(3) Here, Ms. Lyday declined an accommodated job that paid a comparable wage. Therefore, under the principles set forth in both Foulk and Copeland, a post-injury wage is imputed to Ms. Lyday that is comparable to the wages she earned during the period of accident. Because the post-injury wage is at least 90 percent of her average weekly wage before her accidental injury, Ms. Lyday's benefits are limited to her functional impairment rating as set forth in the Agreed Award originally entered.

(4) Ms. Lyday's entitlement to permanent partial disability benefits has not changed and, therefore, the request to modify the Agreed Award should be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review & Modification dated November 3, 1997, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director